

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

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DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

CVS PHARMACIES
Respondents.

Case No.s: DH-I-07-D100273
DH-I-07-D100274
DH-I-07-D100279
DH-I-07-D100288
DH-I-07-D100291
DH-I-07-D100292
DH-I-08-D100282
DH-I-08-D100304
DH-I-08-D100305
DH-I-08-D100307
(CONSOLIDATED)

SCHEDULING ORDER

Respondents filed a motion to stay my Final Order pending appeal on July 7, 2008.¹ In their motion to stay, Respondents reargue their so far unpersuasive argument that they are likely to succeed on the merits, but makes only passing reference to the line of cases that hold that “likelihood of success on the merits” does not require a court “to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits.” *Washington*

¹ Apparently, Respondents filed their motion via telefax on July 8, 2008. See OAH Rule 2810.2. However, on July 8, 2008, Respondents also filed a hand-written document that I construe to be a motion requesting that the “motion to stay be deemed received on July 7, 2008.” It is unclear if Respondents served this document on the Government. See attached copy. For purposes of this Scheduling Order only, I will consider Respondents’ motion to stay as having been filed on July 7, 2008. The Government may set forth its opinion regarding this motion in a subsequent brief. I will rule on the motion and opposition, if any, at a later date.

Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)

(“*WMATA*”). In *WMATA*, the Circuit Court of Appeals also noted:

An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

WMATA, 559 F.2d at 844. *See also In re: Antioch University*, 418 A.2d 105 (D.C. 1980).

It is unclear how, if at all, this line of cases and the associated analysis should effect my decision to grant a stay pending appeal of my Final Order. Further, while the belatedly-filed affidavits filed by Respondents provide a factual predicate for Respondents’ argument, I have significant and important unanswered questions that flow from these affidavits that have direct bearing on my decision regarding Respondents’ pending motion. Among other questions is my concern for the public safety if a stay is granted.

In their pleadings, Respondents attached copies of their policies concerning drug recalls, as well as policies of the Food and Drug Administration (“FDA”). Both of these policies indicate that recall procedures revolve around, at least in part, the lot number of the recalled drugs. In fact, CVS policy is to “offer to make an exchange for any unused portion with a product with a lot number not affected by the recall.” Exhibit 208 (emphasis added). Respondents argue that a stay advances the public interest, despite the fact that: 1) Respondents’ and the FDA’s policy utilize a recalled drug’s lot number to help manage the recall; 2) Respondents offer an exchange for “any unused portion with a product with a lot number not affected by the recall;” and 3) Respondents do not place the manufacturer’s lot number on their medication container labels. Respondents have failed to show how the public interest is

advanced if the status quo is maintained (meaning that they will continue not to put the manufacturer's lot number on medication container labels), when Respondents cannot implement FDA drug recall policy, let alone their own, under the current scheme.

Therefore, in order to assess the merits of the pending motion to stay, I am ordering additional briefing and an evidentiary hearing. OAH Rule 2812.8. During the evidentiary hearing, the parties shall present all evidence and argument that they wish me to consider before ruling on the pending motion to stay. As briefs have to be filed and the Respondents' witnesses do not appear to live in the metropolitan area, I will delay the evidentiary hearing for a number of weeks.

Therefore, based on the entire record herein, it is this 14th day of July 2008

ORDERED that no later than **July 28, 2008**, Respondents shall file a supplement to their motion to stay; it is further

ORDERED that no later than **August 15, 2008**, the Government shall file its opposition to Respondent's motion to stay; it is further

ORDERED that no later than **August 22, 2008**, Respondents shall file a reply to the Government's opposition to its motion to stay, if any; it is further

ORDERED that no later than **August 29, 2008**, the parties shall serve on each other and file with this administrative court witness lists (with a description of their proposed testimony), each expert witness's curriculum vitae, as well as a copy of all documents to be used as exhibits at the evidentiary hearing; it is further

ORDERED that the parties and any counsel shall appear for an evidentiary hearing on Respondents' motion to stay pending appeal to be held on **Friday, September 5, 2008, at 9:30 a.m. at 825 N. Capitol St., N.E., Suite 5100, Washington, DC 20001.**

July 14, 2008

_____/SS/_____
Jesse P. Goode
Administrative Law Judge